

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AT TACOMA

CASCADE MANUFACTURING SALES, INC., a
Washington corporation,

Plaintiff,

vs.

PROVIDNET CO TRUST, a Washington trust
d/b/a WORMSWRANGLER.COM; BARRY
RUSSELL, an individual,

Defendants.

Case No.: **C08-5433RBL**

PLAINTIFF'S REQUEST FOR LEAVE
TO SUPPLEMENT CONTEMPT
FILING, LIFT STAY, AND ORDER
DEFENDANTS TO SHOW CAUSE

NOTING DATE: April 3, 2009

I. INTRODUCTION

Despite the Court's Order which enjoined Defendants Providnet Co. Trust (d/b/a wormswrangler.com) and Barry Russell ("**Defendants**") from using Plaintiff's "WORM FACTORY" trademark (the "**Mark**") or any confusing variations of the Mark, Defendants continue to use the Mark. In fact, use of the Mark by Defendants and their distributors continues to proliferate on the internet, with new distributors using the Mark each day. Plaintiff requests leave to supplement its pending contempt motion with the additional evidence – which shows ongoing noncompliance with the Injunction as of the date of this filing. Plaintiff additionally requests that Defendants be ordered to show cause that they (1) have themselves complied with the Injunction and have taken steps to ensure their distributors comply with the Injunction and (2) are not engaging in advertising using the

1 Mark (including keyword advertising) either directly or through their distributors in order to
 2 circumvent the Injunction. Defendants should be sanctioned for their ongoing noncompliance.

3 II. PROCEDURAL BACKGROUND

4 The Court is aware of the factual underpinnings of the dispute and Plaintiff will not reiterate
 5 them in detail here. The Court issued an Order on November 12, 2008 granting Plaintiff's motion for
 6 a preliminary injunction enjoining the Russell Defendants from using the term "worm factory" and
 7 confusingly similar terms in connection with the sales of composting bins. (November 12, 2008
 8 Order (Dkt. # 33).) Defendants filed a motion for clarification and reconsideration. The Court issued
 9 an Order on January 7, 2009 affirming the November 12, 2009 Order and providing guidance to the
 10 Defendants as follows:

11 [The November 12] Order was intended to enjoin the use of the term "Worm Factory" *and*
 12 *confusingly similar marks*. "Factory of Worms" is confusingly similar to "Worm Factory."...
 13 Defendant has simply rearranged the two operative words, which does not sufficiently
 14 distinguish the Defendant's product from the Plaintiff's....*nor does the addition of the term*
 15 *"Gusanito" prior to the "Factory of Worms" name remove or cure the infringement...*
 16 While it is clear that changing the Defendant's website and other marketing materials imposes
 17 a burden upon it, that is not a reason to permit a continued infringement.

18 (January 7, 2009 Order (Dkt. #42) (emphasis added).) This Order provided that Defendants were
 19 required to comply within "30 days from the date of [the Order]." (*Id.*)

20 As of March 2009, Defendants still had not complied with the Injunction, and Plaintiff filed a
 21 Motion for Contempt which was noted for April 3, 2009. Following Plaintiff's contempt-filing,
 22 counsel for Defendants sought to withdraw. The Court granted the request to withdraw and stayed
 23 the contempt Motion pending engagement of replacement counsel by Defendants. (April 9, 2009
 24 Order (Dkt. # 50).)

25 III. ADDITIONAL EVIDENCE OF NON-COMPLIANCE

26 Ample evidence exists which demonstrates that Defendants have willfully circumvented the
 27 Injunction. Plaintiff presented some of this evidence to the Court in its contempt filing. (See Dkts. #
 44 (Bronski Decl.), 47 (eBay Decl.), and 48 (Amazon Decl.).) However, Plaintiff requests leave to
 supplement the evidence on its Motion for Contempt with additional evidence attached to the

1 Declaration of Andrew Danskin (the internet-marketing manager for Plaintiff) which shows
2 continued non-compliance with the Injunction. As Mr. Danskin's Declaration shows, willful
3 circumvention of the Injunction by Defendants includes the following:

- 4 (1) use on the websites of distributors, who continue to use "Gusanito Factory of Worms";
- 5 (2) continued use by Defendants on their own website(s); and
- 6 (3) keyword advertising purchased by Defendants and their distributors (i.e., advertising
7 which displays "sponsored results" which are triggered by search terms such as
8 "Factory of Worms" or "Worm Factory").

9 The evidence attached to the Danskin Declaration shows ongoing non-compliance, notwithstanding
10 the filing of a contempt motion by Plaintiff. This evidence further rebuts Defendants' arguments that
11 they attempted in good faith to comply with the Injunction. Rather than attempt to comply, the
12 Defendants and their distributors actually amplified their infringement and improper use of the Mark
13 by Defendants and their distributors has increased in this case since the Injunction. Thus, Plaintiff is
14 forced by the circumstances to request that it be granted leave to supplement its Motion for Contempt
15 with the Danskin Declaration. In addition, Plaintiff respectfully requests that the Court issue an
16 Order to show cause which requires Defendants to demonstrate what steps they took to comply with
17 the Injunction, including (i) any internal communications regarding compliance and (ii) any
18 communications with third party distributors regarding compliance.

19 IV. CONCLUSION

20 As set forth above, Plaintiff respectfully requests that it be granted leave to supplement its
21 Motion for Contempt (Dkt. # 43) with the evidence submitted herewith. Plaintiff also requests that
22 Defendants be required to show cause why they should not be sanctioned. Finally, the stay should be
23 lifted and Plaintiff respectfully requests that this matter be set for hearing.

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1 DATED this 6th day of May, 2009.

2 For Plaintiff

3 **BALASUBRAMANI LAW**

4 /s/ Venkat Balasubramani

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 6, 2009, I caused the foregoing
**(1) PLAINTIFF'S REQUEST FOR LEAVE TO SUPPLEMENT MOTION FOR
CONTEMPT; (2) DECLARATION OF ANDREW DANSKIN; AND (3) PROPOSED
ORDER** to be filed via the Court's CM/ECF system. A copy was transmitted to Defendants' last
known address (as reflected in the Motion to Withdraw filed by counsel for Defendants): Barry
Russell, c/o PMB #103, Box 7530, Yelm, WA 98597.

I declare under penalty of perjury under the laws of the United States and the State of
Washington that the foregoing is true and correct and that this declaration was executed on May 6,
2009, at Seattle, Washington.

/s/ Venkat Balasubramani

Venkat Balasubramani